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Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE APPELLANTS JOHN F. HEALY, et al.

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QUESTIONS PRESENTED

1. Does Connecticut's beer price affirmation law cause an impermissible extraterritorial effect in violation of the Commerce Clause of the United States Constitution even though it allows beer shippers to change prices in other states "at any time," before and after monthly posting, without requiring such changes to be duplicated in Connecticut?

2. If shippers are not free to change such prices in other states because of regulatory restrictions in those other states, is Connecticut's beer price affirmation law nevertheless a valid exercise of its power to regulate the sale of beer within its borders under the Twenty-first Amendment to the United States Constitution?

PARTIES

The parties in the action are as follows:

Appellants

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control.

Appellees

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the States of Massachusetts, New York and Rhode Island:

Anheuser-Busch Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESSEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.

Intervenor-Appellants

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS, INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988) and a copy of the slip opinion appears in the Joint Appendix ("J.A.") at page 189A. The earlier opinion of the United States District Court for the District of Connecticut is reported as *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987) and a copy of that slip opinion appears in J.A. at p. 165A.

JURISDICTION

The statutory provision on which the jurisdiction of this Court is invoked is 28 U.S.C. Sec. 1254 (2), which provides for a direct appeal to the Supreme Court of the United States by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the United States Constitution.

28 U.S.C. Sec. 2101 (b) provides that such appeal shall be taken within ninety days after the entry of judgment.

The judgment of the United States Court of Appeals for the Second Circuit on review herein was entered on June 13, 1988. J.A. p. 187A. Appellants filed their Notice of Appeal pursuant to Supreme Court Rule 10 on June 29, 1988, J.A. p. 208A, and docketed the case by filing their Jurisdictional Statement pursuant to Supreme Court Rule 12.3 on September 12, 1988. *See* Record. This Court noted probable jurisdiction in the case on November 14, 1988. J.A. p. 212A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the United States Constitution:

The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const., Art. I, Sec. 8, cl. 3

The Twenty-first Amendment to the United States Constitution:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const., Amend. XXI, Sec. 2

The Beer Price Affirmation Provisions of the Connecticut Liquor Control Act:

No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63 a(b)[1]

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[1] Conn. Gen. Stat. § 30-63 a(b) was ruled to be repealed by implication in a Declaratory Ruling by the Connecticut Department of Liquor Control. *See Healy II*, 849 F.2d, at 756, J.A. at p. 194A; Declaratory Ruling, J.A. at p. 28A.

At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63b(b).

In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered at the time of posting by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler, provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "actual cost of delivery" shall mean those expenses incurred by such manufacturer or our-of-state shipper in delivering the item of beer to the wholesaler from the point of origin to the point of destination, the term "point of origin" shall mean the location which has been established through course of dealing as the geographic location from which the wholesaler has been charged by the manufacturer or out-of-state shipper for costs of transportation, notwithstanding the fact that the item of beer may have been manufactured or bottled at, or shipped from, a different geographic location, the term "point of destination" shall mean the location which has been established through course of dealing as the geographic location at which the wholesaler takes delivery of the item of beer, the term "state taxes and fees" shall mean the excise taxes imposed

or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes and packages, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

Conn. Gen. Stat. § 30-63c(b)

The Pricing Provisions Allowing Out-Of-State Changes:

This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

Conn. Gen. Stat. § 30-63b(e)

The Posting Provisions of the Connecticut Liquor Control Act:

Each manufacturer, whoesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery.

Conn. Gen. Stat. § 30-63(c)

STATEMENT OF THE CASE

The Appellees (herein referred to as "brewers") are the major producers or importers of beer in the United States. They initiated this lawsuit in response to the enactment by the Connecticut General Assembly in 1984 of certain corrective legislation to the beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Pub. Acts Nos. 84-332, 84-432; J.A. at p. 32A and 37A. The original beer price affirmation law was ruled unconstitutional in *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir. 1982) *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) *aff'd* 464 U.S. 909 (1983)(*Healy I*). As was *Healy I*, this case is an action for declaratory judgment and injunctive relief challenging the constitutionality of the beer price affirmation law under the Commerce Clause of the United States Constitution.

The facts in the case have not changed to any significant degree since the ruling in *Healy I*, except that the beer affirmation provisions were significantly amended in 1984. Now, as then, Connecticut has a three-tier system for the distribution of liquor in the general categories of shippers (out-of-state shippers, Conn. Gen. Stat. §§ 30-18, 30-19 and manufacturers, Conn. Gen. Stat. § 30-16), wholesalers (Conn. Gen. Stat. § 30-17) and retailers (Conn. Gen. Stat. § 30-20 *et seq.*). In each category, a license is required, Conn. Gen. Stat. §§ 30-74, 30-77, and, with some exceptions, shippers may only sell to wholesalers, wholesalers may only sell to retailers, and retailers may only sell to consumers. Conn. Gen. Stat. § 30-76. Shippers must give notice to wholesalers of their prices by posting such prices with the Connecticut Department of Liquor Control on a monthly basis. Conn. Gen. Stat. § 30-63(c). Once posted, these prices are controlling for the month following such posting. *Id.* In this system, the brewers are shippers.

Historically, the retail price of beer has been generally higher in Connecticut than in the bordering states of Massachusetts, New York and Rhode Island. *Healy I*, 692 F.2d, at 276. As a consequence, Connecticut residents have crossed

state borders in significant numbers to purchase beer in other states at lower retail prices. *Id.* In 1981 the Connecticut legislature amended the Liquor Control Act by enacting the beer price affirmation laws. Essentially, the law required a brewer to file a sworn affirmation stating that its posted prices *will be no higher* than prices charged in any state bordering Connecticut *during the month covered by posting,* and forbade Connecticut sales in violation of the affirmation. *Healy I,* 692 F.2d, at 277. (Our emphasis.) The purpose of the law was to lower the price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. *Id.*, at 276.

The 1981 law was found to be violative of the Commerce Clause of the United States Constitution, notwithstanding the fact that there were no in-state beer brewers, because of an extraterritorial thrust. "[T]he obvious effect of the Connecticut statute [was] to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a state outside of Connecticut." *Healy I,* 692 F.2d, at 282.

In 1984, the Connecticut General Assembly revised the beer affirmation provisions in several significant respects. First, it narrowed the scope of the affirmation to require that the only time affirmation was effective was "at the time of posting." Public Act 84-332, Sec. 3; J.A. at p.33A. Thus, transactions occurring in other states at other times would not violate the affirmation.[2] Secondly, a new provision was added, codified as Conn. Gen. Stat. § 30-63b(e), which reads:

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[2] To the extent that the legislature neglected to amend Conn. Gen. Stat. § 30-63a(b), which prohibited any Connecticut sales at any time higher than the lowest price offered in the border states, the section was deemed repealed by implication in a Declaratory Ruling of the Department of Liquor Control. *Healy II,* 849 F.2d, at 756, J.A. at p.194A; Declaratory Ruling, J.A. at p. 28A.

> This section [affirmation] shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.
>
> 1984 Conn. Pub. Acts No. 84-322, Sec. 3; J.A. at p. 35A.

The legislature also clarified some definitions used in the formula for determining the lowest price. 1984 Conn. Pub. Acts No. 84-432, Sec. 1; J.A. at p. 37A. Until it was struck down as unconstitutional by the Court of Appeals, the law had been in effect since 1984. To date, there are no beer brewers located within the State of Connecticut.

The United States District Court for the District of Connecticut upheld the constitutionality of the beer price affirmation law on cross motions for summary judgment. *U.S. Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987) (*Healy II*). The brewers appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals found the law to be invalid under the Commerce Clause because of an impermissible extraterritorial effect, and did not decide the issues concerning protectionist legislation or indirect burden on interstate commerce raised therein. *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988) (*Healy II*).

SUMMARY OF ARGUMENT

In its most recent decision on the subject of liquor affirmation laws, this Court found New York's prospective affirmation provisions unconstitutional in *Brown-Forman v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986). New York's law violated the Commerce Clause because it made it illegal for a distiller to reduce its price in other states during the period that its posted price was in effect in New York. *Brown-Forman*, 476 U.S. at 579-580. The Connecticut beer affirmation law before the Court in the instant case was corrected, after having been ruled unconstitutional in *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir. 1982) *rev'g* 532 F. Supp. 1312 (D. Conn. 1982) *aff'd* 464 U.S. 909 (1983) (*Healy I*), with precisely this defect in mind. Under current Connecticut law, brewers must post their price schedule, hold it for the next full month, and affirm that the price *at the time of posting* is no higher than the lowest price offered to wholesalers in the bordering states of New York, Massachusetts and Rhode Island. Conn. Gen. Stat. §§ 30-63, 30-63b(b). Moreover, brewers are permitted to change prices elsewhere "at any time" without violating Connecticut law. Conn. Gen. Stat. § 30-63b(e).

The Court of Appeals for the Second Circuit ruled that the Connecticut law is still unconstitutional because brewers are, in fact, not free to change prices at any time in other states because of regulatory restrictions on price changes in some border states. *The Beer Institute v. Healy*, 849 F.2d 753, 759 (2nd Cir. 1988) *rev'g* 669 F. Supp. 543 (D. Conn. 1987) (*Healy II*). Such matters are clearly outside of Connecticut's control. Connecticut has done all that it can to avoid the extraterritorial effects of its law. If brewers must consider the impact in Connecticut of their pricing decisions in other states, this is not a constitutional injury. As the Court of Appeals for the Sixth Circuit recently ruled in upholding Tennessee's simultaneous affirmation law on distilled spirits, the question is not whether the statute has repercussions elsewhere, but whether it actually undertakes to regulate prices in other states. *Brown-Forman v. Tennessee*, 860 F.2d 1354 (6th Cir.

1988). Any business which chooses to operate in more than one state will face multiple and even inconsistent regulations. The situation in this case is no different and not illegal. Moreover, the Commerce Clause does not protect a brewer from having to think ahead in establishing its pricing strategy. It does not protect any particular method of operation of a business. *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1652 (1987).

In *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) this Court upheld a retrospective affirmation law, declaring, "The mere fact that [the affirmation law] is geared to appellants' pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. While the continuing validity of this particular form of affirmation has been cast in doubt, the Court has not suggested that all forms of affirmation are illegal, only those which regulate prices in other states. This law does not cross that line.

Additionally, Connecticut's law was enacted to solve the social problem of an exodus of residents buying liquor out-of-state, and illegally evading importation and taxation laws. This purpose is valid and useful, and whatever burden, if any, the law imposes on interstate commerce has yet to be proven.

The liquor industry is pervasively regulated due to the volatile nature of the product involved, and, by virtue of the Twenty-first Amendment, regulation is left to the individual states to promulgate in accord with their own policy. Pricing and taxation rules are included in this broad power. Thus, complete uniformity and consistency between the states is not to be expected or desired. By this legislation, Connecticut does not seek to impede the free flow of commerce. It plainly seeks the same fair price for beer as enjoyed by its neighbor states so that its citizens need not caravan across state lines to import their own liquor, completely short-circuiting its licensing and taxation program. This should outweigh whatever interests the brewers have in using Connecticut to subsidize lower prices elsewhere.

ARGUMENT

I. CONNECTICUT'S BEER PRICE AFFIRMATION LAW SPECIFICALLY GUARDS AGAINST CAUSING AN IMPERMISSIBLE EXTRATERRITORIAL EFFECT BY ALLOWING BREWERS TO CHANGE THEIR PRICES IN OTHER STATES "AT ANY TIME," BEFORE AND AFTER MONTHLY POSTING, WITHOUT REQUIRING SUCH CHANGES TO BE DUPLICATED IN CONNECTICUT.

In its most recent decision on the subject of liquor affirmation laws, this Court found New York's prospective affirmation provisions unconstitutional in *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573 (1986). The New York law was virtually identical to the Connecticut law struck down in *Healy I* and was found to be unconstitutional for similar reasons. The Court in *Brown-Forman* intimated that a state's attempt to assure the lowest possible prices for its residents was a legitimate goal. *Brown-Forman*, 476 U.S., at 579. However, New York's method was unlawful under the Commerce Clause of the United States Constitution. "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other states surrender whatever competitive advantages they may possess." *Id.*, at 580; *see also, Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 528 (1935). New York's law was unlawful because "New York makes it illegal for a distiller to reduce its price in other states during the period that the posted price is in effect." *Brown-Forman*, 476 U.S., at 579–580.

The Connecticut statute was corrected in 1984 with precisely this constitutional deficiency in mind. *Healy II*, 849 F.2d, at 755; J.A. at p. 193A. Under current Connecticut law, brewers must post their price schedule, hold it for the next full month, and affirm that the price *at the time of posting*[3]

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[3] By regulation, posting occurs on the sixth day of each month at 10 a.m. *See* 7 Reg. Conn. Agencies, Liquor Cont. Sec. 30-6-B4a (1985). Copy reprinted in J.A. at p. 157A.

is no higher than the lowest price offered to wholesalers in other states bordering Connecticut. Conn. Gen. Stat. §§ 30-63, 30-63b(b). Since posting occurs at a moment in time, it is clear that Connecticut law does not track any time span and thus does not deter price changes by brewers during any time span. Moreover, Conn. Gen. Stat. § 30-63b(e), a new provision added in 1984 Conn. Pub. Acts. No. 84-332, provides:

> This section [affirmation] shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.
>
> J.A. at p. 35A.

Clearly, then, a price change by a brewer in another state cannot constitute a violation of Connecticut law, and brewers are free to change their prices in other states at any time. This eliminates the extraterritorial effect identified in *Brown-Forman* and *Healy I*. Indeed, Plaintiffs, in the trial court below, withdrew argument on the point. *Healy II*, 669 F. Supp., at 548; J.A. at p. 172A.

Nevertheless, the brewers advocated, and the Court of Appeals ruled, that the impermissible extraterritorial effect remains apparent on its face because brewers are in fact not free to change prices[4] in other states because of regulatory

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[4] The Court of Appeals also found an impermissible extraterritorial effect to exist where Connecticut requires brewers to pass along to Connecticut any volume discounts offered in the border states at the time of posting. *Healy II*, 849 F.2d, at 760; J.A. at p. 200A. Indeed, any such inducements must be included in determining the lowest price being offered in the border states. Conn. Gen. Stat. § 30-63c(b); J.A. at p. 36A. Inasmuch as the reasoning finding Connecticut's examination of such inducements to be a

(continued)

restrictions in those other states. Citing the monthly price hold laws in Massachusetts, 138 M.G.L.A. Sec. 25 B(d), and the 180-day hold on price reductions mandated by New York law, N.Y. Alco. Bev. Cont. Law Sec. 55-b(2) (McKinney 1987),[5] the court found that brewers must still look ahead to consider the impact of their pricing decisions on Connecticut when making pricing decisions in Massachusetts and New York. *Healy II*, 849 F.2d, at 759; J.A. at p. 198A.

It is well settled that the practical effect is the critical consideration in determining whether a statute escapes its borders to control liquor prices in other states. *Brown-Forman*, 476 U.S., at 583 *citing Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). However, in this case, Connecticut has done all that it can to remove the extraterritorial effect of its legislation. It does not bar, deter or delay price decisions in other states. It specifically leaves brewers free to select their own price levels in those other states. The fact that there are regulatory restrictions on price changes in other states is a matter outside of Connecticut's control. Connecticut has done all that it can do to avoid interference with pricing decisions in other states, while still referencing those prices.

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[4] *(continued)*
violation of the Commerce Clause is identical to that involved in testing whether Connecticut may gear its affirmation statute to the brewers' pricing policies in other states, the defenses asserted with respect to price examination are equally applicable to inducement examination. Only price examination is discussed in this brief. However, inducement examination is also valid for the same reasons. Our restraint in not duplicating the argument is for the sake of brevity, and should not be construed as a waiver.

[5] Administrative exemptions are available in both states. *See* 138 M.G.L.A. Sec. 25 B(d); N.Y. Alco. Bev. Cont. Law Sec. 55-b(4)(c). Also, brewers may avoid affirmation consequences in Connecticut by not selling for one month or more. *See Healy I*, 532 F. Supp., at 1317. The Court will not assume that governments will permit these measures to solve any constitutional problems in a statute. *Brown-Forman*, 476 U.S., at 582 n.5. However, they should not be ignored, especially here where the Court emphasizes the practical effects.

The Court of Appeals analogized to several Commerce Clause cases involving the transportation industry in finding authority to condemn the interaction of Connecticut's liquor law with the laws of Massachusetts and New York. *See, Healy II*, 849 F.2d at 758; J.A. at p. 197A. This focus is misplaced. Connecticut's affirmation law is not at all like the trailer truck and train laws struck down for obfuscating the transportation industry. Here there is no obvious, practical necessity for a single body, having nationwide authority, to prescribe uniform distribution and trade practice rules as in the transportaiton industry. *Cf. Southern Pacific Co. v. Arizona*, 325 U.S., at 776. To the contrary, in the liquor industry, each state is authorized by the Twenty-first Amendment to design its own distribution system, and the differences are stark. Such authorization to be different is the hallmark of the Twenty-first Amendment. This Amendment grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 110 (1980); *see also, Heublein Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 283 (1972).

Certainly, Connecticut cannot regulate activity beyond its borders, but this affirmation law does not purport to extend its regulatory arm across that line, and it does not unintentionally so extend either. Assuming that affirmation causes brewers to consider what impact their pricing decisions in New York or Massachusetts will have in Connecticut, this is a circumstance which would exist whether or not Connecticut has an affirmation law. Also, it is a fact of life for any business organization which chooses to operate in more than one state that it will be subject to multiple and even inconsistent regulations and any such business must simply be prepared to conform its various local operations to more than one set of laws. Regan, *Siamese Essays*, 85 Mich. L.Rev. 1865, 1881 (1987). This is especially true when the party is involved in a pervasively regulated industry. *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light*, 459 U.S. 400, 413 (1983); *Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877); *Schieffelin v.*

Department of Liquor Control, 194 Conn. 165, 181, 479 A.2d 1191 (1984) (Contracts not impaired by shifting regulatory demands). The question is ". . . not whether the [affirmation] statute has 'repercussions' on liquor prices in other states, but whether [it] has actually undertaken to 'regulate' liquor prices in other states." *Brown-Forman v. Tennessee*, 860 F.2d 1354, ____ (6th Cir. 1988) (Simultaneous affirmation law upheld). Connecticut's law was specifically corrected to avoid such direct regulation. Even in transportation cases, where the challenger can point to no conflicting requirements of other governments, the dormant Commerce Clause challenge is dismissable. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). No conflicting regulatory requirements are present in this case. Connecticut does not mandate price changes in other states; it only permits such changes.

Moreover, the Commerce Clause does not protect a brewer from having to think ahead in establishing its pricing strategy. It does not protect any particular method of operation of a business. *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1652 (1987). It protects interstate markets. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). No interstate markets are imperiled in this case.

In *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), this Court upheld a retrospective affirmation law declaring, "The mere fact that [the affirmation statute] is geared to pricing policies in other states is not sufficient to invalidate the statute." *Id.* at 43. Connecticut's law is geared to the brewers' pricing policies in other states, nothing more. While the continuing validity of retrospective affirmation laws has been cast in doubt,[6] this Court has not suggested that all forms of

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[6] In considering the continuing validity of the *Seagram* decision, this Court in *Brown-Forman* noted:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach

(continued)

affirmation are unconstitutional.[7] Indeed, the Court declined to take original jurisdiction in a challenge against all affirmation provisions in all the states which have such requirements. *Pennsylvania v. Alabama*, 472 U.S. 1015 (1985) (Motion for leave to file complaint denied). Significantly, affirmation laws are still being enforced or defended in court in eight license states,[8] and it exists in contract requirements in seventeen control states.[9] The corrected affirmation law promulgated by the Connecticut General Assembly squarely and successfully addresses the impermissible extraterritorial effect deficiency identified by the Court in *Brown-Forman* and *Healy I*, and we urge this Court to uphold the law on this ground accordingly.

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[6] *(continued)*

> constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Brown-Forman, 476 U.S., at 584 n.6.

[7] However, the *Brown-Forman* decision was cited as authority for striking down several "simultaneous" affirmation provisions in other states: *Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON, slip op. (D. Del. Dec. 17, 1987); *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Comm'n*, 672 F. Supp. 1383 (D.N.M. 1987); *Brown-Forman Distillers Corp. v. South Carolina Alcoholic Beverage Control Comm'n*, 643 F. Supp. 943 (D.S.C. 1986); *but see, Brown-Forman v. Tennessee*, 860 F.2d 1354 (1988).

[8] Arizona, Ariz. Rev. Stat. Ann. Sec. 4-253(A) (Supp. 1986); California, Cal. Bus & Prof. Code Sec. 23673 (West, 1985); Connecticut, *supra;* Florida, Fla. Stat. Sec. 565.15(1) (1985); Georgia, Ga. Comp. R & Regs. r. 560-2-3-.47 (1982); Oklahoma, Okla. Stat. Ann. tit. 37, Sec. 536.1 (West Sup. 1987); Rhode Island, R.I. Gen. Laws Sec. 3-6-14.1 (1987) and Tennessee, Tenn. Code Ann. Sec. 57-3-202(e) (1)-(3) (1980). In "license" states, the sale of liquor is conducted by private industry subject to state regulation. Connecticut is the only license state with an affirmation law covering beer.

[9] Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, West Virginia, and Wyoming. Nat'l Alc. Bev. Cont. Ass'n, Price Affirmation Compilation, at p. 11 (1987). In "control" states, the sale of liquor is conducted by the government.

II. THE AFFIRMATION LAW DOES NOT OTHERWISE CONSTITUTE PROTECTIONIST LEGISLATION, NOR DOES IT IMPOSE AN INDIRECT BURDEN ON INTERSTATE COMMERCE.

The *Brown-Forman* decision summed up the two-tiered approach to analyzing state economic regulation under the Commerce Clause as follows:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry . . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman, 476 U.S. at 579 (Citations omitted).

The issue of direct regulation of interstate commerce has already been discussed above in the context of extraterritorial effect. The Court of Appeals found it unnecessary to reach the issues of discrimination (which has been called "economic protectionism") *Healy II*, 849 F.2d, at 758, J.A. at p. 196A, and indirect burden on interstate commerce; however, this Court noted probable jurisdiction over these issues in the companion case of *Wine and Spirits Wholesalers of Connecticut, Inc. v. The Beer Institute*, No. 88-513, and these issues are discussed *seriatim*:

Economic Protectionism

It is clear that this form of regulation is "virtually per se" unconstitutional under the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925); *see also, Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982); *but see, New Energy Co. of Indiana v. Limbach*, 108 S.Ct. 1803, 1810 (1988) (Possible exceptions listed). A finding that state legislation constitutes economic protectionism may be made on the basis of either

discriminatory purpose or effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). There is evidence of neither in the instant case.

Considering the purpose of a law, it has been held that discriminatory state statutes enacted for protectionist purposes will be invalidated. *Bacchus, Id., citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 352–53 (1977). The brewers may selectively cull passages from the legislative debates to contend that the purpose of the 1981 or 1984 law was to protect Connecticut business from out-of-state competition. However, the purpose of the original beer price affirmation law, enacted in 1981 Conn. Pub. Acts. No. 81-294, was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. *Healy I*, 692 F.2d, at 276 *citing trial court decision*, 532 F. Supp., at 1316–17. The trial court in *Healy I* thus found: "Because neither the statute nor the legislative debates reveal an avowed purpose to discriminate against out-of-state businesses, the statute cannot be invalidated on the basis of its purpose alone" *Healy I*, 532 F. Supp., at 1323. This finding was not disturbed on appeal. *See*, 692 F.2d, at 281, n.11. Even if the matter can be relitigated now, it is clear that Connecticut's purpose is valid. A state may seek lower prices for its consumers. *Brown-Forman*, 476 U.S., at 580. It has every right to "protect its residents' pocketbooks." *Philadelphia v. New Jersey*, 437 U.S., at 626. Regulations designed to assure "a fair price and a responsible purchaser" are assumed to be valid. *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530 (1949). This legislation is of like purpose.

Nor is the purpose of the 1984 legislative action invalid. The declared purpose of 1984 Conn. Pub. Acts Nos. 84-332, 84-432 was to remedy the constitutional problems found by the Court of Appeals and affirmed by this Court in *Healy I*. *Healy I*, 849 F.2d, at 755; J.A. at p. 193A. There is certainly no unconstitutional purpose here.

Considering the effect of the law, it is clear that Connecticut cannot cause producers or consumers in other states to surrender whatever competitive advantages they may possess. *Brown-Forman*, 476 U.S. at 580. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition. *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S., at 523. In the instant case, Connecticut does not discriminate in favor of in-state brewers. There are no in-state brewers. *Healy II*, 849 F.2d, at 755; J.A. at p. 192A. No violation of the Commerce Clause exists here. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-72 (1981).

Nevertheless, the brewers advocate that the law works a protectionist effect by equalizing prices at the wholesale level between Connecticut and its neighbors, thereby negating the competitive advantage of business in neighboring states relative to Connecticut businesses. In this regard, they are claiming discrimination not against themselves, but to the ability of Massachusetts, New York and Rhode Island retailers to sell liquor at cheaper rates than Connecticut retailers. Such retailers have been conspicuously absent in this litigation.[10] Moreover, Connecticut is not seeking a competitive advantage over other states for its industry or consumers. *Cf., Bacchus Importers Ltd. v. Dias*, 468 U.S. at 273. It seeks to end a history of price discrimination which has caused its consumers to cross state borders in significant numbers to purchase beer at lower retail prices elsewhere encouraging violation of personal importation laws. Conn. Gen. Stat. § 12-436. In the past this Court has found no Commerce Clause violation where non-discriminatory regulations

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[10]Plaintiffs do not have standing to raise a retailer's or consumer's claim. They sell only to wholesalers. Conn. Gen. Stat. §§ 30-18, 30-19. "[A] plaintiff must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties . . . . *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This is especially true in cases such as the instant case, where Plaintiffs' interests are antagonistic to the interests of retailers and consumers. *See, Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953).

protected local residents from deceptive or socially repugnant trade practices. *See, e.g., Breard v. Alexandria*, 341 U.S. 622 (1951) (restrictions on solicitors); *California v. Thompson*, 313 U.S. 109 (1941) (Fraud in the sale of automobile tours). We urge it to rule likewise in the instant case.

In measuring the effect of the law, the touchstone principle is that the Commerce Clause protects interstate markets, not particular interstate firms or their particular structure or methods of operation. *Exxon v. Maryland*, 437 U.S., at 127-28. The law in the instant case applies to all brewers. "[A] non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S., at 474. Even the brewers do not suggest that the beer selling market has shifted in this sense. Therefore, no impermissible effect is worked by Connecticut's beer price affirmation law. Connecticut here is not seeking to keep prices artificially high to protect local producers, as in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) or *Baldwin v. G.A.F. Seelig, Inc., supra*. Also, as the *Seagram* court noted, it is by no means clear that this law must inevitably produce higher prices in other states rather than the lower prices sought for Connecticut. By this law, Connecticut seeks the same fair price as the brewers deliver to Massachusetts, New York and Rhode Island. This is hardly contrary to the provisions of the Commerce Clause.

Indirect Burden on Interstate Commerce

Under this portion of the Commerce Clause test, the Court is called upon to weigh the State's interest at stake in the law and its local benefits against the burdens on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S., at 142. That the State's interest in obtaining the best prices for its consumers is legitimate is well-settled and cited earlier. The local benefits

are obvious. Any burden on the interstate commerce in beer has yet to be established.

Affirmations have been in effect in this country since the Des Moines Warranty of 1937, the simultaneous affirmation contract provision requiring sales of spirits to control states to be no higher than the lowest offered anywhere else in the country. *See,* de Ganahal, *Trade Practice and Beverage Control in the Alcoholic Beverage Industry,* 7 Law & Contemp. Prob. 664, 677 (1940). The license states commenced promulgating legislation on the subject with New York's 1964 retrospective affirmation provisions upheld in the *Seagram* case. The Court in that case reserved decision on whether affirmation "could ever constitute so grave an interference with a company's operations elsewhere as to make the regulations invalid under the Commerce Clause." *Seagram,* 384 U.S., at 42–43. After twenty years of experience with New York's affirmation law, this Court eventually found its modern prospective affirmation law unconstitutional under the Commerce Clause not under the *Pike v. Bruce Church, Inc.* test, but because of its impermissible extraterritorial effects. *Brown-Forman,* 476 U.S., at 581. Likewise, in the instant case, no court has ever struck down Connecticut's affirmation law as an indirect burden on interstate commerce. The earlier, prospective version was tested by the trial court in *Healy I* and no impermissible burden was found. 532 F. Supp., at 1327. This finding was not disturbed on appeal, *Healy I,* 692 F.2d, at 282, although the statute fell for impermissible extraterritorial effects. The present version was tested in *Healy II* and again no impermissible, indirect burden was found. 669 F. Supp., at 543. Again, this finding was not disturbed on appeal, 849 F.2d, at 758, nor should it be. *See, Maine v. Taylor,* 447 U.S. 131, 145 (1986). Understandably, the Court of Appeals did not even address the brewers' claim that the case was not ripe for summary judgment on the issue. *See* Brewer's Appellate Brief, pp. 33–36, Record; State's Appellate Brief, pp. 27–31, Record. The brewers have had time enough to prove whether this law works a material and adverse effect on interstate commerce and they failed to make a sufficient showing on the

essential elements of their case on which they have the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Connecticut has successfully removed the extraterritorial effects of its affirmation law by allowing beer shippers to change prices in other states at any time, before and after posting, without requiring such changes to be duplicated in Connecticut. The law is not otherwise protectionist, nor an indirect burden on interstate commerce. There can be no doubt as to its constitutionality under the Commerce Clause.

III. EVEN IF SHIPPERS ARE NOT FREE TO LOWER SUCH PRICES IN OTHER STATES BECAUSE OF REGULATORY RESTRICTIONS IN SUCH OTHER STATES, THE AFFIRMATION LAW REMAINS A VALID EXERCISE OF CONNECTICUT'S TWENTY-FIRST AMENDMENT POWER.

The States are the depositories of broad power under Sec. 2 of the Twenty-first Amendment to the United States Constitution to regulate the importation and use of intoxicating liquor within their borders. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). This section grants the states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Liquor Dealers v. Midcal Aluminum*, 445 U.S., at 110. It certainly does not repeal the Commerce Clause, but the Amendment created an exception to the normal operation of the Commerce Clause. *Craig v. Boren*, 429 U.S. 190, 206 (1976). Indeed, it has been explained that when the interests implicated by a state liquor regulation are so closely related to the powers reserved by the Twenty-first Amendment, the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy. *Bacchus Importers, Ltd. v. Dias*, 468 U.S., at 276; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). A "core power" of the states under the Twenty-first Amendment is the

regulation of the sale or use of liquor within their borders. *Id.* at 713. In cases of conflict, the Court engages in a "pragmatic effort to harmonize state and federal powers" within the context of the issues and interests at stake in each case. *Ibid.* at 714.

As already demonstrated, the beer price affirmation law does not transgress the territorial limitations imposed by the Commerce Clause and is not otherwise protectionist or an indirect burden on interstate commerce. Thus, "the action is not within that domain which the Constitution forbids." *Seagram*, 384 U.S., at 43. Assuming, *arguendo*, that there is a constitutional conflict in the present system because brewers are not free to change prices in other states because of restrictions in those states, it is clear that Connecticut in this case has exercised a core power of the Twenty-first Amendment. It is directly regulating the sale or use of liquor within its borders. With each state entitled to regulate liquor in accord with its own policies, complete uniformity is not to be expected or desired.

Connecticut has enacted, over the past 55 years, a pervasive regulatory system guiding the traffic of liquor within its borders, detailing who can sell what, to whom, when and where and for how much. *See, generally,* Brennan, *Liquor Control*, 54 Conn. B.J. 611 (1980). The State considers protection against overcharge as one of its duties in liquor control. Conn. Gen. Stat. § 30-6. This system promotes the valid state purpose of maintaining an orderly business environment conducive of the lawful commerce in liquor. *Schwartz v. Kelly*, 140 Conn. 176, 180, 99 A.2d 89 (1953), *app. dismissed* 346 U.S. 891 (1954). From this commerce the State derives tax revenue. This system is weakened and rendered ineffective when the State's consumers find it worthwhile to caravan across state lines to illegally[11] import their own liquor, completely short-circuiting an entire state licensing and taxation program.

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[11] Personal importation proscriptions are codified in Conn. Gen. Stat. § 12-436.

As noted earlier, Connecticut, in this legislation, does not seek to protect local businesses from competition by keeping prices artificially high, as in *Pike v. Bruce Church, Inc., supra*, or *Baldwin v. G.A.F. Seelig, Inc., supra*. The statute mandates only that Connecticut wholesalers be treated as well as out-of-state wholesalers. This can hardly be characterized as contrary to the policies of the Commerce Clause.

When a state acts as a market participant, it is free to favor its own citizens. *See, Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Affirmation is mandated in the control states. *See*, footnote 9, *supra*. To outlaw an even-handed and narrowly drafted affirmation law in this license state, merely because the State is not a market participant, emphasizes form over substance. Connecticut should not be required to dismantle its private industry and become a control state to obtain the same fair price for beer as other states enjoy.

A state effort to monitor the traffic in liquor within its jurisdiction and to control its price and taxation is a direct exercise of Twenty-first Amendment powers. *Cf. United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973) *after remand* 421 U.S. 599 (1975); *but see, 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987) (Interest in minimum mark-up unsubstantiated). Whatever interference this may work against the brewers' interest in forcing Connecticut citizens to subsidize lower prices elsewhere is certainly entitled to no weight.

All state laws enjoy a presumption of validity. Liquor laws, by virtue of the Twenty-first Amendment, enjoy an added presumption of validity. *California v. LaRue*, 409 U.S. 109, 118 (1972). This law, as amended, is a valid exercise of that power, and is entitled to continued enforcement unless and until a specific and unquestionably clear example of constitutional abuse is proven. Such has not been demonstrated in this case.

CONCLUSION

For all the foregoing reasons, we urge the Court to order the judgment of the United States Court of Appeals for the Second Circuit be reversed, and the case remanded with instructions to enter judgment for the Appellants.

Respectfully submitted,

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